90-1509

No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

AURELIANO GALINDO VASQUEZ,

*Petitioner,*

VS.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

Whether the Court below, disagreeing with the Second Circuit Court of Appeals and the Colorado Supreme Court, erred in holding that police use of a dog to sniff odors emanating from private premises in order to disclose whether they contain contraband does not constitute a "search" under the fourth amendment.

## PARTIES BEFORE THE COURT OF APPEALS

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The appellant before the Court of Appeals was Aureliano Galindo Vasquez, the petitioner herein.

The appellee was the United States of America, the respondent herein.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner Aureliano Galindo Vasquez respectfully prays that a writ of certiorari issue to review the judgment and opinion entered in this proceeding by the United States Court of Appeals for the Seventh Circuit.

## OPINION BELOW

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The opinion of the Court of Appeals is reported at 909 F.2d 235. A copy of the opinion appears in the Appendix at App. 1-13.

## JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 1990. A petition for rehearing was denied on October 26, 1990. On January 18, 1991, an Order was entered extending the time for filing this petition until March 25, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

The facts that are material to consideration of the question presented are simple and undisputed.

On May 24, 1988, Chicago police officers received a tip from a confidential informant that a garage contained a large amount of cocaine. *See* Appendix at 2. Located on an otherwise vacant lot, the garage directly abutted a public alley. *See id.* It had two doors: an overhead door

that swung out into the alley, which was secured with both a standard key-lock in the door and a large padlock, and a second door, which was boarded up and nailed shut. *See id.*

After receiving this tip, the officers brought a narcotics detection dog to the alley by the locked garage. *See id.* at 3. From there the dog sniffed the garage and "alerted" to the presence of drugs inside it. *See id.* The officers then obtained a search warrant, searched the garage, and recovered a substantial quantity of drugs. *See id.*

Aureliano Galindo Vasquez, the petitioner herein, was subsequently arrested and charged with various drug-related offenses. *See id.* at 1. The district court's jurisdiction of the case was based on 18 U.S.C. § 3231. Prior to trial, Mr. Vasquez filed a motion to suppress the evidence recovered from the garage. The trial court ruled, in relevant part, that the dog-sniff of the contents of the garage was not a "search" for purposes of the fourth amendment. *See id.* at 17-18.

On appeal, the Seventh Circuit Court of Appeals affirmed the trial court's decision on this issue. *See id.* at 4-6. Citing this Court's decisions in *United States v. Place*, 462 U.S. 696 (1983), and *United States v. Jacobsen*, 466 U.S. 109 (1984), the Court stated as a general proposition that "a canine sniff test that is used to detect the presence of contraband is not a fourth amendment search." *Id.* at 5. Applying that general proposition to the specific facts of this case, the Court held that police use of a dog to sniff odors emanating from private premises in order to disclose whether they contain contraband does not constitute a "search" under the fourth amendment. *See id.*

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION BELOW CONFLICTS WITH A DECISION OF ANOTHER CIRCUIT AND CONFLICTS IN PRINCIPLE WITH DECISIONS OF THE HIGHEST COURT OF A STATE AND THIS COURT.

1. The decision below conflicts with the decision of the Second Circuit Court of Appeals in *United States v. Thomas*, 757 F.2d 1359 (2d Cir.), *cert. denied*, 474 U.S. 819 (1985).

In *Thomas*, as in the instant case, police used a dog to sniff odors emanating from private premises (in that case an apartment). 757 F.2d at 1366-67. Both *Thomas* and the Court below began their analysis of the issue with this Court's decision in *United States v. Place*, 462 U.S. 696 (1983), a case involving exposure of luggage to a dog-sniff test in a public place (an airport). The Court below relied upon *Place* as support for the general proposition that a dog sniff which discloses nothing more than the presence of contraband, and is otherwise non-intrusive, is not a fourth amendment "search" *per se*. *See* Appendix at 5. The premise that underlay this proposition was that a person cannot, as a matter of law, have a legitimate expectation of privacy in contraband. *See id.*

By contrast, *Thomas* distinguished *Place*:

> It is one thing to say that a sniff in an airport is not a search, but quite another to say that a sniff can *never* be a search. The question always to be asked is whether the use of a trained dog intrudes on a legitimate expectation of privacy.

757 F.2d 1366 (emphasis in the original). *Thomas* then framed the "privacy" issue differently than the Court below. According to the Second Circuit, the issue was not whether the defendant had a legitimate expectation of privacy in the contraband, but rather whether he "had a legitimate expectation that the contents of his closed apartment would remain private." 757 F.2d at 1367. Reasoning that the defendant had such an expectation, the Court held that the dog sniff of the odors emanating from his apartment constituted a "search" under the fourth amendment. *Id.* *Place* was distinguished on the ground that "[w]hile one generally has an expectation of privacy in the contents of personal luggage, this expectation is much diminished when the luggage is in the custody of an air carrier at a public airport." *Id.* at 1366. *Thomas*, we submit, correctly analyzed and decided this issue.

The conflict between *Thomas* and the position ultimately adopted by the Court below was brought to the Court's attention. *See* Defendant's Opening Brief at 14-18. The Court's decision, however, did not cite *Thomas*, much less address this conflict.

2. The decision of the Court below likewise conflicts in principle with the decision of the Colorado Supreme Court in *People v. Unruh*, 713 P.2d 370 (Colo. 1986). There the police took a safe from the defendant's home, which they then exposed to a drug detection dog at the police station. *Id.* at 372-73. The Court held, in relevant part, that (1) the police detention of the safe was a lawful seizure, and (2) the exposure of the safe to the canine sniff constituted a "search" under both the fourth amendment and the state constitution. *Id.* at 378. In reaching this latter holding, the Court reasoned that "the defendant, or anyone in his situation, could have no expectation that

the privacy provided by a locked safe in his basement would be subject to a governmental investigative technique of any sort." *Id.* (citation omitted).

*Unruh* thus framed the "privacy" issue in similar terms as *Thomas*. Unlike the Court below, both the Colorado Supreme Court and the Second Circuit Court of Appeals focused not on whether there existed a reasonable expectation of privacy in the contraband, but rather on whether there existed such an expectation in the contents of the private premises. *Cf. People v. Dunn*, 77 N.Y.2d 19, 563 N.Y.S.2d 388, 390-92 (1990) (holding, under facts similar to *Thomas*, that the dog sniff did not constitute a "search" under the fourth amendment, but did constitute one under the identically worded provision of the state constitution).

3. Finally, the decision of the Court below conflicts in principle with this Court's recent decision in *Arizona v. Hicks*, ____ U.S. ____, 107 S.Ct. 1149 (1987). The facts of that case, as relevant here, were that (1) police were lawfully within an apartment; (2) they there noticed stereo equipment that seemed out of place; (3) one of the officers moved some of the components in order to determine their serial numbers; and (4) he then called those numbers into police headquarters and learned that the equipment had been stolen. 107 S.Ct. at 1151-52. The Court held that the officer's "moving of the equipment" in order to obtain the serial numbers constituted a "search" for purposes of the fourth amendment. *Id.* at 1152-53.

The *Hicks* holding and analysis are, we submit, contrary to those of the Court below. Applying the analysis of the Court below to this fact situation, one would have reasoned as follows: (1) stolen property is contraband, *see, e.g.*, Ill. Rev. Stat. ch. 38, § 16-1(a)(4) (1989) (prohibiting

knowing possession of stolen property); (2) therefore, a person cannot have a legitimate expectation of privacy in it; (3) the police conduct in moving the stereo components did nothing more than disclose whether the private premises contained contraband; and (4) therefore, this conduct did not constitute a "search" under the fourth amendment.

The Court's analysis, of course, did not proceed in this fashion. Rather, the Court's analysis was consistent with that of the Second Circuit Court of Appeals in *Thomas* and the Colorado Supreme Court in *Unruh*. In each case, unlike the instant case, the focus was not upon the contraband status of the item in question, but rather upon the place in question and the reasonableness of an expectation of privacy in the contents of that place. *Hicks* further illuminates, we submit, the fundamental flaw in the analysis of the Court below.

## II.

## THE DECISION BELOW RAISES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE SETTLED BY THIS COURT.

1. The question raised involves a collision between two important principles. The first is the well-established principle that the contents of private premises are subject to fourth amendment protection unless "a person knowingly exposes [them] to the public." *Katz v. United States*, 389 U.S. 347, 351 (1967). The second is the principle, which has emerged more recently in this Court's decisions in *Place* and *Jacobsen*, that a person cannot have a legitimate expectation of privacy in contraband. *Jacobsen*, 466 U.S. at 123; *Place*, 462 U.S. at 707. Neither *Place* nor *Jacobsen* considered this latter principle in the context of private premises.

As discussed in the previous section, this Court's recent decision in *Hicks* provides strong support for the proposition that, in this context, the legitimacy of an expectation of privacy in the contents of private premises overrides the illegitimacy of an expectation of privacy in contraband. This case presents the Court with an opportunity to address and resolve the relationship between these competing principles of fourth amendment law.

2. The case law reflects that this is a recurring question on which the decisions of the lower courts are in disarray. As noted in the previous section, the Seventh Circuit's decision in this case and the Second Circuit's decision in *Thomas* conflict, as do the Colorado Supreme Court's decision in *Unruh* and the New York Court of Appeals' decision in *Dunn*. Furthermore, *Dunn*, which held that a dog sniff is this context did not constitute a "search" under the fourth amendment, both (1) held that it did constitute a "search" under the identically worded provision of the state constitution, and (2) strongly criticized what it deemed to be the federal constitutional law on this issue. *See* 563 N.Y.S.2d at 391-92. Yet another approach to the issue has been taken by the Oregon Supreme Court, which held in *State v. Slowikowski*, 307 Or. 19, 761 P.2d 1315 (Or. 1988), that a dog sniff of odors emanating from a rented locker was not a "search" under either the fourth amendment or the state constitution because "the officer hoped and expected that [the dog] would find marijuana in another locker, not defendant's," and thus the disclosure did not constitute a "*purposive intrusion* into defendant's privacy." 761 P.2d at 1320 (emphasis added).

The disarray and uncertainty in the law on this issue is likewise reflected in the commentaries. Noting the great uncertainty on this issue, Professor LaFave wrote in his

widely used treatise on fourth amendment law that "the *Place* holding does not validate the use of drug detection dogs in all circumstances" and thus "there *still may be* instances in which utilization of the dogs is properly subject to Fourth Amendment restraints even after *Place*." 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.2(f), at 373 (2d ed. 1987) (emphasis partly added and partly in the original). By confining its comments to dog sniffs in different contexts, the current edition of a widely used practitioner's handbook on fourth amendment law likewise reflects the uncertain state of the law on this issue: "Private property located in public and semi-public places is subject to sniffing by a dog. Such an act is not a search." M. Hermann, *Search and Seizure Checklists* 317 (1991 ed.).

In light of the foregoing, it is not surprising that the New Hampshire Supreme Court, after reviewing the confused state of the case law on this issue, recently wrote that "there is good reason to believe that we have not heard the last word on whether a dog sniff is a search under the fourth amendment." *State v. Pellici*, 580 A.2d 710, 718 (N.H. 1990) (holding that a dog sniff of the exterior of a car constitutes a "search" under the state constitution). This case presents the Court with an opportunity to provide such a "last word," or at least some much-needed clarification of the law on this issue.

3. As the Court recently noted, the drug problem represents "one of the greatest problems affecting the health and welfare of our population." *Nat'l Treasury Employees Union v. Von Rabb*, ____ U.S. ____, 109 S.Ct. 1384, 1392 (1989). Thus, it is a matter of great social importance that law enforcement authorities have as much guidance as possible concerning the weapons that they may, and may

not, lawfully employ in waging the "war on drugs." If the indiscriminate use of drug detection dogs is lawful, law enforcement authorities should know that. And if it is not, they should know that as well. This case presents the Court with an opportunity to provide such guidance.

4. Finally, the issue whether a police investigative technique falls within the ambit of the fourth amendment has important ramifications. If it does not, then the police are simply "unrestrained and thus free to utilize this procedure in a wholesale fashion, at random, or on nothing more than a whim or hunch." 1 W. LaFave, *supra*, § 2.2(f), at 370. In the instant context, such a determination raises "an Orwellian notion"—"the specter of the police roaming indiscriminately through the corridors of housing projects with trained dogs in search of drugs." *Dunn*, 563 N.Y.S. 2d at 392. This case presents the Court, as *Place* and *Jacobsen* did not, with an opportunity to consider the police use of drug detection dogs in light of this "specter."

## CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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# APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 89-1908

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

AURELIANO GALINDO VASQUEZ,

*Defendant-Appellant.*

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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 CR 456—**Ann Claire Williams**, *Judge.*

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ARGUED FEBRUARY 15, 1990—DECIDED AUGUST 1, 1990

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Before WOOD, JR., COFFEY, and FLAUM, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* At the conclusion of his bench trial, defendant-appellant Aureliano Galindo Vasquez was convicted of possession of 112 kilograms of heroin and fifty-seven kilograms of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and knowingly using and carrying firearms during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c). Vasquez received a 360-month sentence of imprisonment for his conviction under 21 U.S.C. § 841(a)(1) and a consecutive sixty month sentence of imprisonment for his 18 U.S.C. § 924(c) conviction.

## I. FACTUAL BACKGROUND

On April 20, 1988, members of the Chicago Police Department's Gang Crimes South unit began surveillance of Aureliano Vasquez. The police followed Vasquez to a garage located on a grassy vacant lot that had no visible address. The garage directly abutted a public alley. The garage had an overhead door that swung out into the alley and a door that was boarded up and nailed shut. The overhead door was secured with both a standard keylock integrated in the door and a large padlock. Vasquez unlocked the garage door with keys, raised the door only high enough so that he could enter by crouching down, and quickly closed the door behind him. Vasquez entered the garage empty-handed, but he emerged several minutes later with a partially filled green plastic garbage bag. After locking both locks to the overhead door, Vasquez drove his car to a house in Burnham and went inside carrying the plastic garbage bag. After approximately ten minutes, Vasquez left the house without his garbage bag.

Vasquez then drove to a hot dog stand and made a short phone call from a public telephone. Vasquez returned to the garage, went inside in the same furtive manner as before, and again exited with a partially filled green plastic bag. Vasquez deposited this plastic bag at an apartment building. Before terminating their surveillance for that day, the officers observed the tireless Vasquez return once more to the garage and depart with another green garbage bag with unknown contents.

On May 19, 20, and 23, the officers conducted surveillance near the garage and observed Vasquez perform the same covert ritual of entering the garage in a crouch and then transporting partially filled plastic garbage bags to the same apartment building he had visited on April 20. The officers observed no one other than Vasquez enter the garage during the entire period of surveillance.

Officer Williams had a conversation with a confidential informant on May 24, 1988, who informed him that the garage contained a large amount of cocaine. Officer Wil-

liams then enlisted the aid of Detective Thomas Kinsella of the Drug Enforcement Agency and his certified narcotics detection dog "Rex." Officer Kinsella brought Rex to the alley abutting the garage for a sniff. When Rex reached the garage, he barked excitedly and pawed at the overhead door that Vasquez had used when entering and exiting the garage. Rex's behavior was his way of indicating that narcotics were close at hand. Confident that the garage contained drugs, Officer Williams obtained a warrant to search the garage based upon Rex's alert to the presence of drugs and the confidential informant's tip.

The officers executed the warrant later that day. Inside the garage, the officers found an inoperative Ford Thunderbird with kilograms of narcotics on the floor of the passenger compartment and inside the trunk. Officer Williams testified at the defendant's trial that the trunk was stuffed with "softball size packages of drugs" and that "you couldn't have put a baseball into the trunk it was so stuffed." Williams also stated that the officers found one loaded handgun and three handguns with unloaded clips "shoved in with the narcotics in the trunk." After seizing the drug cache, the officers waited in and near the garage for Vasquez to return.

At 6:00 that evening Vasquez returned to the garage. The officers arrested him after he opened the overhead door with his key. When he was arrested, Vasquez was carrying a pager, an address book, keys to the Thunderbird's trunk ignition switch and doors, and keys for the locks on the overhead garage door. The government later determined that the seized guns were capable of being fired.

Prior to trial, Vasquez filed a motion to suppress the narcotics and guns that were seized at the scene of the crime and a motion to dismiss the section 924(c) charge on the ground that he did not "use" or "carry" the recovered firearms. On appeal, Vasquez challenges the district court's ruling on his suppression motion, the sufficiency of the evidence supporting his conviction under 18 U.S.C. § 924(c),

and the propriety of the district court's upward departure from Vasquez's sentencing range on the basis of the quantity of drugs involved in his offense.[1] We affirm Vasquez's conviction and sentence for the reasons that follow.

## II. MOTION TO SUPPRESS

Vasquez contends that the trial court erred when it ruled that the use of a certified narcotics detection dog to sniff the garage did not constitute a search within the meaning of the fourth amendment. Furthermore, Vasquez asserts that the trial court also erred in holding that even if the warrant in this case was invalid because of the allegedly illegal dog sniff "search," the *Leon* "good faith" exception to the exclusionary rule applied because the officers executed the search in objective good-faith reliance on a search warrant issued by neutral magistrate. *See United States v. Leon*, 468 U.S. 897, 926 (1984). Of course, if we determine that a dog sniff is not a fourth amendment search or that the sniff search was supported by a reasonable suspicion, based upon articulable facts, that the garage contained contraband, Vasquez's "fruit of the poisonous tree" argument will wither on the branch.

In *United States v. Place*, 462 U.S. 696 (1983), the Supreme Court noted that a sniff test of seized luggage at an airport is not a fourth amendment search requiring probable cause and a search warrant. *Id.* at 707. The Court reasoned that a canine sniff, unlike other investigative techniques, exposes only criminality and not other legitimately private interests:

> We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. A "canine sniff" by a well-trained narcotics detection dog, however,

[1] The defendant-appellant's Motion for Leave to File a Response to the Government's Submission of Supplemental Authority is GRANTED.

> does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment entailed in less discriminate and more intrusive investigative methods.

*Id.* (citation omitted). In *United States v. Jacobsen*, 466 U.S. 109 (1984), the Court reaffirmed its statement in *Place* that official conduct such as a canine sniff of an inanimate object does not compromise any legitimate interest in privacy. The *Jacobsen* Court relied on *Place* when it held that conducting a field test to "merely disclose whether or not a particular substance is cocaine" is not a "search" within the meaning of the fourth amendment. *Id.* at 123-26, 124 n.24.

Since *Place* was decided, we too have consistently held that a canine sniff test that is used to detect the presence of contraband is not a fourth amendment search. *See United States v. Mayomi*, 873 F.2d 1049, 1054 n.5 (7th Cir. 1989); *United States v. Teslim*, 869 F.2d 316, 323 (7th Cir. 1989); *United States v. Rivera*, 825 F.2d 152, 158 (7th Cir.), *cert. denied*, 484 U.S. 979 (1987). *See also United States v. Beale*, 736 F.2d 1289, 1290-91 (9th Cir.), *cert. denied*, 469 U.S. 1072 (1984); *United States v. Klein*, 626 F.2d 22, 24-25 (7th Cir. 1980) (pre-*Place*). Thus, the trial court correctly ruled that subjecting the garage to a "sniff-test" from a public alley was not a warrantless search. We do not reach the issue of whether a showing of "reasonable suspicion" is necessary to initiate a dog sniff search that is more intrusive and that exposes private information other

than the presence of contraband. *See United States v. Colyer*, 878 F.2d 469, 477-83 (D.C. Cir. 1989); *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470, 475-80 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983); *United States v. Goldstein*, 635 F.2d 356, 360-62 (5th Cir.), *cert. denied*, 452 U.S. 962 (1981).

The only challenge raised to the warrant is that the affidavit was tainted because it relied on information secured through the sniff search in violation of the fourth amendment. Because we have determined that the sniff search did not result in a fourth amendment violation, the search warrant was not the fruit of the poisonous tree/sniff search. *See Rivera*, 825 F.2d at 158.

## III. SUFFICIENCY OF THE EVIDENCE

Vasquez challenges the sufficiency of the evidence supporting the district court's ruling that he "used" the four guns contained in the Thunderbird's trunk in violation of 18 U.S.C. § 924(c). Subsection 924(c) provides in part that:

> (c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . .
>
> (2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

18 U.S.C. § 924(c)(1)-(2). Vasquez asserts that the evidence at trial of the presence of the four handguns in the trunk of the Thunderbird was insufficient to support a conviction under section 924(c). Vasquez maintains that there was no evidence that the firearms were readily accessible and therefore that they played a role in the offense. In reviewing

the evidence against Vasquez, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Muehlbauer*, 892 F.2d 664, 667 (7th Cir. 1990).

In *United States v. Rosado*, 866 F.2d 967, 970 (7th Cir.), *cert. denied*, 110 S. Ct. 117 (1989), we discussed the meaning of the word "use" in section 924(c). We quoted then-Judge Kennedy's observation in *United States v. Stewart*, 779 F.2d 538 (9th Cir.), *cert. denied*, 484 U.S. 867 (1987), that:

> "If the firearm is within the possession or control of a person who commits an underlying crime as defined by the statute, and the circumstances of the case show that the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others, whether or not such display or discharge in fact occurred, then there is a violation of the statute."

*Rosado*, 866 F.2d at 970 (quoting *Stewart*, 779 F.2d at 540). The evidence in *Rosado* established that the defendant wore a jacket containing the concealed weapon to a drug transaction, but that he removed the jacket and left it and the gun in his automobile when he conducted a drug transaction inside another vehicle a short distance away. We found that Congress did not intend that the statute be given a "cramped reading," *id.*, and that Rosado clearly used and carried the handgun during his drug trafficking offense. *Id.* at 969.

Lack of an opportunity to brandish or shoot his weapon did not mean that Rosado did not "use" the gun; nor does the fortuitous absence of a threatening occasion for Vasquez to sally forth with his arsenal rescue him from culpability under the statute. *See id.* at 969-70; *United States v. Moore*, 580 F.2d 360, 362 (9th Cir.), *cert. denied*, 439 U.S. 970 (1978). A gun is "used" under the statute if its presence " 'increased the likelihood of success' " of the

drug offense as a means of protection or intimidation, *see Rosado*, 866 F.2d at 970 (quoting *United States v. LaGuardia*, 774 F.2d 317, 321 (8th Cir. 1985)), or if its presence provides the defendant with the "security and confidence needed to undertake such a large cocaine transaction." *Id.*

The evidence presented at Vasquez's trial established that the firearms were located in the trunk amidst a staggering cache of narcotics. Vasquez acted circumspectly when he visited the garage, and demonstrated a natural fear that his extraordinarily large drug supply would be discovered. On one occasion, Vasquez betrayed his fear of being pursued from the garage by taking an evasive route up and down side streets, which turned a ten-minute drive into a forty-five minute commute. The guns were at the ready every time Vasquez delved into his narcotics-laden Thunderbird. The trier of fact could reasonably conclude that the availability of firearms instilled Vasquez with a heightened sense of security while he possessed the drugs with the intent to distribute them. This is not a case where a defendant is penalized for fortuitously " 'hav[ing] a gun in his possession when he commits an entirely unrelated offense.' " *United States v. Stewart*, 779 F.2d 538, 539 (9th Cir. 1985) (quoting *United States v. Moore*, 580 F.2d 360, 362 (9th Cir.), *cert. denied*, 439 U.S. 970 (1978)).

A rational trier of fact could find that the presence of four firearms in an isolated building used only to store a massive amount of narcotics, which was frequently visited by only the distributor of the drugs, evinced a "use" of firearms by the defendant to provide security and confidence. *See United States v. Matra*, 841 F.2d 837, 842-43 (8th Cir. 1988) (weaponry protected large quantities of cocaine in house, "use" under the statute); *United States v. Robinson*, 857 F.2d 1006, 1010 (5th Cir. 1988) (jury could reasonably conclude that guns "used" as integral part of drug offense as "an integral means of protecting [the defendant's] possession of the cocaine"); *LaGuardia*, 774 F.2d at 321 ("use" of weapons where they had "undoubted utility in the protection of the valuable [drug] supply and of the cash on hand"). It was certainly logical

for the trial judge to conclude that under the circumstances Vasquez had an evident need for weaponry that was readily available in the event a covetous competitor or a group of government agents arrived to appropriate his hoard. Vasquez's argument that there was an equally rational inference—that the guns were buried under the trunkload of narcotics and therefore inaccessible—overlooks our obligation to consider the evidence in the light most favorable to the government and not the defendant. *See United States v. Durrive*, No. 89-1434, slip op. at 14 (7th Cir. May 15, 1990); *United States v. Molinaro*, 877 F.2d 1341, 1348 (7th Cir. 1989).

## IV. DEPARTURE FROM THE SENTENCING GUIDELINES

Judge Williams found Vasquez guilty of possession of 112 kilograms of heroin and fifty-seven kilograms of cocaine with intent to distribute, pursuant to 21 U.S.C. § 841(a)(1). Under the Sentencing Guidelines ("Guidelines"), the applicable base offense level for Vasquez's offense and the amount of drugs involved was level 36. Guidelines § 2D1.1. At the time of Vasquez's sentencing, level 36 was the highest base offense level available for one convicted under 21 U.S.C. § 841(a)(1), and a defendant rose to this pinnacle of the base offense levels by possessing ten kilograms of heroin or fifty kilograms of cocaine. Cross-referencing Vasquez's base offense level of 36 with his category I criminal history resulted in a sentencing range of 188 to 235 months.[2] Guidelines, ch. V, pt. A, Sentencing Guidelines

[2] On November 1, 1989, approximately six months after the defendant's sentencing, an amendment to the Drug Quantity Table, Guidelines § 2D1.1(c), took effect. The amendment essentially added three upper level categories of drug quantities, with concomitantly increased base offense levels, to the Drug Quantity Table and reformulated the table accordingly. If Vasquez were sentenced under the new scheme, which accounts for those, like Vasquez, who are convicted of drug crimes on a grand scale, he would have had a base offense level of 40 and a sentencing range of 292 to 365 months imprisonment.

Table. Due to the extraordinary amount of drugs seized, the government moved for an upward departure from the guideline range, and requested that the district court impose a sentence of at least 480 months imprisonment. The defendant claimed that he was entitled to a downward departure because he was a neophyte in the drug trade and was not a "high level participant."

The sentencing court disagreed with the defendant's modest description of his involvement in drug trafficking. The district court found that the defendant had "sole control of the narcotics," and that Vasquez was "very culpable" and "high up in the chain." The district judge decided to depart upward based upon the enormous quantity of drugs involved in Vasquez's offense and imposed a sentence of 300 months imprisonment. In imposing Vasquez's sentence, the district judge stated:

> This is not a situation where we're talking about five kilos or ten kilos beyond what the guidelines are. This is a tremendous amount of narcotics, and I think it would not serve the purposes of the guidelines or the intent of Congress to have a situation where you have one individual who possessed ten kilos that receives a sentence within the guideline range and someone here who has much in excess receives a similar kind of sentence. And so because of the quantities that are involved here, 112 kilos of heroin and 57 kilos of cocaine, the Court feels that an upward departure is warranted.

On appeal, Vasquez challenges only the district court's decision to depart from the Guidelines sentencing range because of the extraordinary amount of narcotics he had nestled in the Thunderbird.

We review a district court's decision to depart from the Guidelines sentencing range to determine whether it was reasonable in light of the factors dictated by the Guidelines and the district court's explanation for the departure. 18 U.S.C. § 3742(e); *United States v. Carey*, 895 F.2d 318, 322 (7th Cir. 1990); *United States v. Jordan*, 890 F.2d

968, 972 (7th Cir. 1989); *United States v. Miller*, 874 F.2d 466, 471 (7th Cir. 1989). As this court noted in *Miller*, " '[r]easonableness' implies that a sentencing judge must provide articulable reasons, of a type contemplated by the Act and the Guidelines, and based on a sufficiently sound factual foundation, to justify a departure from the guidelines." 874 F.2d at 471. The Sentencing Commission, however, "did not intend tc deprive district courts of 'sensible flexibility' in deciding to depart from the Guidelines." *Jordan*, 890 F.2d at 973.

Under 18 U.S.C. § 3553(b), a district court is obliged to impose a sentence within the applicable guideline range "unless the court finds that there exists an aggravating . . . circumstance of a kind, or *to a degree*, not adequately taken into account by the Sentencing Commission . . . ." (emphasis added). The Sentencing Commission itself recognized that courts have broad discretion to depart from the Guidelines in appropriate cases:

> [I]n principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure. In this initial set of guidelines, however, the Commission does not so limit the courts' departure powers. The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. *When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.*

Guidelines, pt. A, § 4(b). *Resolution of Major Issues* (Policy Statement) (emphasis added). The Commission also stated that it would monitor and analyze departures from the "initial set" of guidelines in order to later "create more accurate guidelines that specify precisely where departures should and should not be permitted." *Id.*

We find that Vasquez's case presented the district court with the atypical case where upward departure was appropriate. The 112 kilograms of heroin Vasquez possessed was more than eleven times the ten-kilogram quantity listed as the then maximum base offense level 36. Disregarding the heroin, the fifty-seven kilograms of cocaine Vasquez possessed would have placed him at a base offense level of 36. There is no merit in the defendant's suggestion that the initial base offense levels for drug possession only went up to 36 because the Commission "recognized the diminishing utility of quantity as a distinguishing factor." The amended Drug Quantity Table, which now addresses large-quantity dealers like Vasquez, indicates that the Commission does regard drug quantity as a continually valid distinguishing factor. The Commission's policy statement informing district courts that they may depart from the "heartland" of typical cases each guideline represents when confronted with "conduct [that] significantly differs from the norm," also undermines the defendant's argument that the Sentencing Reform Act and the Guidelines did not contemplate upward departures for defendants convicted of drug crimes involving drug amounts far in excess of the initial Guidelines Drug Quantity Table.

Vasquez also asserts that because the fraud crime section of the Guidelines, Guidelines § 2F1.1, explicitly allows upward departure based on the quantity of money stolen while the drug crime section lacks such an explicit departure provision, the Commission must have considered and rejected quantity-based upward departures for drug crimes. One of the Guideline's policy statements, however, cautions that the Commission's failure to include a sentencing factor in the Guidelines for one offense, while including it in the Guidelines for others, does not mean that the sentencing factor may not serve as a basis for departure from the former Guideline. Guidelines § 5K2.0. Other courts have found that an upward departure from the guideline for simple possession of narcotics, which does not refer to drug quantity, may be based on drug quantity where the amount possessed is atypical. *See United States v. Crawford*, 883 F.2d 963, 964-66 (11th Cir. 1989) (upward depar-

ture warranted due to amount and purity of cocaine possessed); *United States v. Ryan*, 866 F.2d 604, 606-10 (3d Cir. 1989) (upward departure warranted based on amount of cocaine possessed); *United States v. Correa-Vargas*, 860 F.2d 35, 38 (2d Cir. 1988) (quantity of cocaine "sufficiently unusual" to warrant upward departure in conviction for using communication facility in committing drug offense, although Guidelines did not refer to quantity as a factor). We join those courts that have rejected the argument that drug quantity may not serve as the basis for departure from the applicable guideline range when the particular guideline does not adequately consider an atypical amount of drugs.

We conclude that the district court reasonably departed from the Guidelines. The circumstance upon which the court based the departure, the defendant's sole possession of an astronomical amount of drugs that far exceeded the upper boundary of the applicable Drug Quantity Table, was "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b). The district judge's thoughtful exposition of the reasons why she believed Vasquez's circumstances were atypical and a departure was therefore warranted has persuaded this court that the decision to depart from the Guidelines was well within the realm of reason.

## V. CONCLUSION

The conviction and sentence appealed from are AFFIRMED.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: August 1, 1990

BEFORE: Honorable Harlington Wood, Jr., Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorable Joel M. Flaum, Circuit Judge

No. 89-1908

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

AURELIANO GALINDO VASQUEZ,

*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 88 CR 456, Judge Ann Claire Williams

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 26, 1990.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

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No. 89-1908

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

AURELIANO GALINDO VASQUEZ,

*Defendant-Appellant.*

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 88 CR 456—Ann Claire Williams, *Judge.*

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## ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendant-appellant on August 31, 1990, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing *in banc* be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| UNITED STATES OF AMERICA | ) | |
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| v. | ) | No. 88 CR 456 |
| | ) | |
| AURELIANO GALINDO VASQUEZ | ) | |

## MEMORANDUM OPINION AND ORDER

Mr. Vasquez asks this court to suppress evidence recovered from a search of his garage and to dismiss Count 3 of the indictment. Both motions are denied.

On May 24, 1988, Chicago police officers obtained a search warrant to search a garage belonging to Mr. Vasquez. The garage was located on a vacant lot, was an enclosed, free-standing structure, and abutted on a public alley. The search warrant was issued on the basis of a police officer's conversation with a "cooperating individual" and on the basis of a positive alert by a narcotics dog.

The government has conceded, as it must, that the information gathered from the "cooperating individual" is inadequate to establish probable cause. The police officer who spoke to the "cooperating individual" gave no basis for the issuing judge to assess the informant's veracity or his track record as a reliable informant. The officer does not even say whether or not the informant gave him any information about illegal activity. The officer merely reports that he "had a conversation on 24 May 88 with a Cooperating Individual in regards to a garage that has a large amount of cocaine," and that the informant described the garage. As far as helping to establish probable cause for the search warrant, the officer's narrative

of his contact with the informant is completely worthless, even under the relaxed "totality of the circumstances" test set forth in *Illinois v. Gates*, 402 U.S. 213 (1983).

If this search warrant is to stand, it must do so entirely on the basis of the positive reaction by the narcotics detection dog. There is surprisingly little law on this precise issue. Cases abound where dog sniffs were used to corroborate other evidence of the presence of drugs. See, e.g., *U.S. v. Rivera*, 825 F.2d 152, 158 (7th Cir. 1987); *U.S. v. Klein*, 626 F.2d 22, 27 (7th Cir. 1980); *U.S. v. Knox*, 839 F.2d 285 (6th Cir. 1988); *U.S. v. Race*, 529 F.2d 12, 14 (1st Cir. 1975). While the parties have pointed to no cases where a positive dog sniff can by itself equal probable cause, this is a reasonable extension of this common investigative technique. See, e.g., Wayne R. LaFave, 1 *Search and Seizure: A Treatise on the Fourth Amendment* § 2.2(f) and Comment, 13 San Diego L. Rev. 410 (1976). Mr. Vasquez does not contest the reliability of the narcotics detection dog in this case.

Mr. Vasquez argues that the dog sniff of his garage was itself a warrantless search without probable cause and that therefore this element of the affidavit supporting the warrant was improper. This argument is foreclosed by *U.S. v. Place*, 402 U.S. 696 (1983) and *U.S. v. Jacobsen*, 466 U.S. 109 (1984). In *Place*, the Court observed that a dog sniff, since it is unintrusive and can only detect the presence of contraband, does not constitute a search. However, this pronouncement was dicta, and there was uncertainty as to the Court's commitment to it. See, e.g., *Place*, 462 U.S. at 720-24 (Blackmun, J., concurring) and Wayne R. LaFave, 1 *Search and Seizure: A Treatise on the Fourth Amendment* § 2.2(f). That uncertainty has been dispelled by *U.S. v. Jacobsen*, 466 U.S. 109, 123-24. See also *U.S. v. Beale*, 736 F.2d 1289, 1290-91 (9th Cir. 1984).

A non-intrusive technique, such as a dog sniff, that only discloses the presence or absence of contraband, does not infringe upon any reasonable expectation of privacy. *Jacobsen*, 466 U.S. at 123.

Even if the court were to find this particular warrant invalid, the officers were entitled to rely on it in good faith. In spite of the fact that the Supreme Court has not spoken definitively on all the various issues raised by dog sniffs, there has been sufficient lower court authority, including authority in this circuit, finding that police can rely on dog sniffs to establish probable cause. See, e.g., *Rivera*, 825 F.2d 152 (7th Cir. 1987) and *Race*, 529 F.2d 12 (1st Cir. 1975).

Given this authority, it cannot be said in this case that a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization. *U.S. v. Leon*, 468 U.S. 897 (1984). Put another way, even if this warrant was not issued on probable cause, Mr. Vasquez cannot show that it was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S. at 923.

Mr. Vasquez also argues that 18 U.S.C. § 924(c) does not apply to the conduct he is alleged to have committed, and therefore that Count 3 of this indictment should be dismissed. His first argument is that "possession with intent to distribute" (the allegation against him in Count 2) is not covered by the language of § 924(c)(2), "any felony violation . . . involving the distribution, manufacture or importation of any controlled substance." The language of the statute simply will not support Mr. Vasquez's construction: "possession with intent to distribute" is clearly a felony "involving" distribution. If the terms of a statute are unambiguous, then "judicial inquiry is complete" and

it is unnecessary to resort to legislative history to construe the statute. *Rubin v. U.S.*, 449 U.S. 424, 430 (1981). The court also finds persuasive the reasoning in *U.S. v. Matra*, 841 F.2d 837 (8th Cir. 1988) and *U.S. v. James*, 834 F.2d 92 (4th Cir. 1988) which rejected a similar argument. Mr. Vasquez's second argument is that his constructive possession of the firearms in his garage is not encompassed by the words "uses or carries" in § 924(c)(1). Mr. Vasquez's definition of "use" is too narrow. "Use" of a firearm in § 924(c) contemplates that the weapon was in the actor's control at the relevant time and that it played a role in the crime. A defendant does not have to have brandished a gun. *U.S. v. Matra*, 841 F.2d 837 (8th Cir. 1988); *U.S. v. LaGuardia*, 774 F.2d 317 (8th Cir. 1985).

Mr. Vasquez's motions to suppress the evidence against him and to dismiss Count 3 are denied.

ENTER:

/s/ Ann Claire Williams, Judge
United States District Court

Dated: OCT 6 1988